Supreme Court, U.S.
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No. 91-1162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SID GOODMAN & COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE; and EDWARD MADIGAN, SECRETARY, U.S. DEPARTMENT OF AGRICULTURE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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AMICUS CURIAE BRIEF OF TIPCO, INC. IN SUPPORT OF PETITIONER

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Amicus Curiae, TIPCO, Inc. (hereinafter "TIPCO"), pursuant to Supreme Court Rule 37, files this Amicus Curiae Brief in support of the petition for a writ of certiorari filed by Sid Goodman & Company, Inc.[1] TIPCO respectfully prays that this Court grant the petition for a writ of certiorari to review the judgment of the United

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[1] Pursuant to Supreme Court Rule 37.2, Amicus Curiae TIPCO obtained the written consent of all parties involved in this proceeding to file this brief. Contemporaneous with the filing of this brief in support of the petition for a writ of certiorari, TIPCO filed letters of consent it received from the petitioner and the respondents.

States Court of Appeals for the Fourth Circuit entered in this proceeding.

INTEREST OF AMICUS CURIAE

Amicus Curiae, TIPCO, a PACA licensee, is a wholesale supplier of produce located in the Maryland Wholesale Produce Market in Jessup, Maryland.[2] The Director of the Fruits and Vegetable Division of the Agricultural Marketing Service filed complaints against Sid Goodman & Co. (hereinafter "Goodman") initially, and thereafter, filed its complaint against TIPCO alleging that Goodman and TIPCO's activities violated Section 2(4) of the Perishable Agricultural Commodities Act of 1930 (hereinafter "PACA") (7 U.S.C. § 499(b)(4) (West Supp. 1991).

On February 28, 1990, Administrative Law Judge Kane in the Goodman case determined that Goodman violated the PACA and revoked Goodman's license. In contrast, on April 19, 1990, Administrative Law Judge Hunt concluded that "TIPCO did not violate the Perishable Agricultural Commodities Act, 1930 as amended" and therefore, "dismissed the complaint and amended complaint." Thereafter, the Judicial Officer Donald A. Campbell reversed that finding and revoked TIPCO's license noting his concern that affirming the Administrative Law Judge's decision would not send the right "message" to "this multi-billion dollar industry." *See In re TIPCO*, 50 Agric. Dec. at 908.

On January 30, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the Judicial Officer's decision in *TIPCO* in an unreported per curiam opinion. *See TIPCO, Inc. v. USDA*, No. 91-1435 (4th Cir., filed January 30, 1992). Thereafter, TIPCO filed a timely petition for rehearing and suggestion for rehearing in

[2] The petitioner, Sid Goodman & Co. is also a produce business which operates its wholesale fruit and vegetable dealership at the Jessup produce market.

banc. To date, no decision has been rendered by the Court of Appeals for the Fourth Circuit on TIPCO's petition. Assuming *arguendo* that TIPCO's petition is denied, TIPCO intends to file a petition for a writ of certiorari with this Court. Said petition will include, *inter alia*, many of the arguments raised by the petitioner here in the extant petition.

SUMMARY OF ARGUMENT

Without predicate in the legislative history, precise statutory language or any regulation, the petitioner is subject to the ultimate sanction, i.e., the loss of its license. That result violates the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194 (1946) and its progeny. Amicus Curiae, TIPCO respectfully prays that this Court grant the petition for a writ of certiorari so as to further examine and define the distinctions in regulatory activity by way of statutes, rules or regulations as opposed to "ad hoc" litigation.

ARGUMENT

In the *Goodman* and *TIPCO* cases, the United States Court of Appeals for the Fourth Circuit announces a novel interpretation of the Perishable Agricultural Commodities Act. In so doing, the United States Court of Appeals for the Fourth Circuit improperly discounted the significance of *SEC v. Chenery Corp.*, 332 U.S. 184 (1947) and its progeny in permitting the resolution of this admittedly novel [3] issue through the administrative adjudicatory process instead of through the promulgation of a rule, regulation or statute.

Because the Department of Agriculture (hereinafter "the Department") deems that it cannot condone the payment of money from a licensee to the produce buyer

[3] The Department of Agriculture in both the *TIPCO* and *Goodman* cases has acknowledged that the substantive issues involved in these cases are "novel."

for a grocery chain, it has created a violation of a statute that has never been interpreted before to apply to such activity. Indeed, the Department acknowledges that it has never before suggested that the activities of the petitioner or TIPCO violate the PACA. Moreover, the Department failed to deter such conduct by regulations, policy statements or any other means that would have provided PACA licensees with prior notice of the Department's new-minted position. Instead, the first notice to PACA licensees that the Department interpreted the activities of the petitioner to violate the "implied duties" clause of the PACA has been this case and the companion case of TIPCO.

The Department's actions were not a rule-making exercise. Nevertheless, a new "rule" was divined. Unpublished and uncodified standards of conduct have become the predicate for the ultimate sanction of revocation of the petitioner's license. The 50 years since the enactment of the amendment to the PACA which added the "implied duties" clause to 7 U.S.C. § 499(b)(4) have yielded no reported case or a regulation interpreting or expanding the ambit of the statute to cover the circumstances at bar.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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